No. 22565

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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PACIFIC CAR AND FOUNDRY COMPANY,

Petitioner,

vs.

HONORABLE MARTIN PENCE, UNITED STATES DISTRICT JUDGE, DISTRICT OF HAWAII, and L. C. O'NEIL TRUCKS PTY. LIMITED,

Respondents.



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# PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT IN THE NATURE OF MANDAMUS

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## I. INTRODUCTORY NOTE

The order granting leave to file a petition for writ in the nature of mandamus provides for a brief in opposition (herein (Opp. Br.) and one in reply, in support of the petition. The comprehensive memorandum of facts and law we filed in support of our petition for leave to file is thus our principal brief. So that the court will have ample copies, we have provided the clerk with 17 additional copies of it.

For convenient reference, we have included in this brief as Appendix "A", a copy of the order from which the petition is taken (R. 106-13, reported as 1968 Trade Cases, §72,352).

## II. CORRECTION OF O'NEIL'S FACTS

O'Neil's (respondents are herein referred to as "O'Neil") 'Statement of the Case" (Opp. Br. 1-3) recites only a few of the

facts (set out fully in our initial brief, pages 5-14) necessary to an understanding of this petition. O'Neil has added some "facts" in its brief which are not facts at all. The most glaring instance is on page 31 where O'Neil describes certain "affidavits" filed by it. In fact, O'Neil filed no affidavits showing "that all of its personnel resided in Australia" or showing "that plaintiff's choice of forum was not the result of 'forum shopping'". The only affidavits filed by O'Neil were one identifying certain correspondence (R. 60-83) and one naming six potential witnesses said to be residents of or "connected with" Hawaii (R. 84-87).

## III. THE EXHIBITS TO O'NEIL'S BRIEF ARE NOT PROPERLY BEFORE THE COURT

O'Neil has appended to its brief various documents not before the respondent Judge when he passed on PCF's motion for dismissal or transfer. Indeed, only one, Exhibit "A", was ever presented to the Judge. These documents O'Neil has brought to this court "for such consideration as the Court may choose to give them." (Opp. Br. 3, fn. 1). We are not enlightened by O'Neil as to their purpose and doubt that they have any relevance. Assuming arguendo that they are properly before the court, a few comments are in orde

Exhibit "A", which was expressly "without prejudice to defendant's pending motion to quash return of summons, etc." (p. ii) is an order providing for certain preliminary discovery, including two depositions on each side (p. v). A remarkable feature of the deposition arrangements was that O'Neil served us as counsel for PCF with notice of taking depositions before we appeared in the case and before twenty (20) days had elapsed (Supp. R. 1-8). When our motion to strike the notice came on before Judge Pence,

he indicated, "that this Court would recognize that, technically, the motion to quash is well taken but, as a matter of fact, it would deny the motion." (Tr. 64, 67) (Italics added). The court urged us to work out a deposition schedule "to avoid the matter of making the decision it was about to make." (Tr. 67).

Faced with the certainty that our motion was about to be denied, we agreed to Pre-Trial Order No. 1. Our alternative was to afford O'Neil complete deposition priority, when, as the Judge observed, our motion to quash was "well taken".

The remaining documents O'Neil has appended to its brief are merely unilateral proposals by O'Neil served after Judge Pence's ruling on venue. None of them has been approved by us or by the court. We trust that the court will not be confused by the ending of Proposed Pre-Trial Order No. 3 which reads "Approved as to form ... Richard White, Attorney for Defendant." We have not approved or signed this order in any way, shape or form.

While we doubt that any of the exhibits to O'Neil's brief are relevant to the instant petition, this court may be interested to know that O'Neil's primary theory of the case is "an Hawaiian Oke divisions conspiracy ..." (p. xix, fn. 1).

This reference is to Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram and Sons, 1967 Trade Cases §72,186, wherein Judge Pence, at the behest of O'Neil's counsel, held, in a case of "first impression", that unincorporated divisions of a single corporation (such as petitioner's Peterbilt and Kenworth divisions) could conspire with each other in violation of the Sherman Act.

## IV. ISSUES PRESENTED

O'Neil has restated the three questions which we summarized (p. 1-5) and argued (p. 14-40) in our initial brief. These three

questions, which we will treat in order, are the appropriateness of mandamus, whether petitioner transacts business in Hawaii under Section 12 of the Clayton Act, and whether the action should be transferred under 28 U.S.C. §1404(a).

## V. ARGUMENT

### A. Mandamus Is An Appropriate Remedy - O'Neil Is Mistaken In Stating That Denial of the Motion "Rests Upon Factual Determinations"

O'Neil concedes that mandamus is a proper remedy to review orders of the type entered below (Opp. Br. 10) but argues that it is inappropriate because the order here "rests upon factual determinations." (Opp. Br. 7). At the same time O'Neil twice asserts that the record presents "essentially uncontroverted facts."* (Opp. Br. 11, 17).

Rather than resting on "factual determinations", in the traditional sense of the resolution of disputed facts, the finding below that PCF transacts business in Hawaii is a conclusion based on a misreading and misinterpretation of uncontroverted facts. In ruling on our 1404(a) motion, the Judge made no findings whatsoever as to relative convenience but failed to exercise his discretion employing the standards prescribed by the statute, or, for that matter, at all.

The appropriateness, indeed the compelling need, for mandamus is demonstrated by the authorities cited by us at pages 36 - 40 of our initial brief. Also see ACF Industries, Inc. v. Honorable Ernest Guinn, 384 F.2d 15, 20 (5th Cir. 1967).

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*In its Memorandum ... In Opposition to Petition For Leave To File Writ of Mandamus, O'Neil prefaced its review of the District Judge's findings as follows: "In his Opinion, the Respondent Judge found on the basis of admittedly undisputed facts..." (p. 2).

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B. Petitioner Does Not Transact Business In Hawaii Within The Meaning of Section 12 of the Clayton Act (15 U.S.C. §22)

O'Neil's argument (Opp. Br. 10-12, 15-28) in support of the District Court's conclusion that PCF transacts business in Hawaii is long on generalities and short on any close analysis as to whether the ultimate conclusion is warranted by the facts. We can all agree that "Section 12 of the Clayton Act Must Be Liberally Construed" (p. 15-17) and that the facts should be viewed in their "totality" (p. 23). These generalizations are, however, no substitute for a hard look at the record to determine whether the District Judge's conclusions* are supported by the record.

O'Neil has painstakingly pasted together excerpts from opinions which are designed to leave the impression that sale of products through a local distributor in a particular jurisdiction per se makes the manufacturer subject to jurisdiction in that district under Section 12 of the Clayton Act. We have found no case so holding. O'Neil has cited none. The crucial question is always, where jurisdiction is based primarily on the manufacturer-distributor relationship, whether the manufacturer retains such controls that in a practical sense it transacts business through the agency of its distributors. The District Judge understood that the test was one of control. He misread the distributor's contracts to find "a tight control". (App. "A", p. 84,955). In contrast to B. J. Semel Assoc. Inc. v. United Fireworks Mfg. Co., 355 F.2d 827 (D.C. Cir. 1965), a 2-1 decision relied upon by O'Neil, petitioner maintains no control over the financial or other

*As if to put the order out of sight and, therefore, out of mind, O'Neil, instead of printing the order which is all important, chose to append 30 pages of improper and irrelevant material to its brief.

operations of its Hawaiian distributors. In the Semel case the manufacturer dipped far into the distributor's "relations with its own customers -- a circumstance of active interest to appellee [manufacturer] because of its practice of requiring assignment to it of appellant's [distributor's] receivables."

In L. D. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768, 774 (1959) this court noted, in a context of discussing constitutionally minimum contacts:

> "Higgins did correspond with its factory representatives and distributors who purchased Higgins' products and resold them. The factory representatives were independent contractors and not servants or agents. They set their own ultimate prices for the Higgins products."

O'Neil argues that Reeder did not arise under the antitrust laws; hence it cannot apply here (Opp. Br. 26-28). However, we doubt that Section 12 of the Clayton Act can be read as liberalizing venue standards beyond what are found to be irreducible constitutional minimums in non-antitrust matters.

The argument that degree of control or commonlaw principles of agency are immaterial overlooks the many cases in this field, in which courts have held that presence of a subsidiary of the defendant acting as a distributor in the forum district is insufficient to satisfy jurisdiction over a parent under Section 12, unless the parent company exercises control over the day-to-day operations of the resident corporation. The point may be illustrated by the cases cited in our initial brief (p. 18) and by Global Pub. Corp. v. Grolier, Inc., 273 F. Supp. 637, 638 (D. Mass. 1967). That was a Sherman Act case in which the issue was whether venue was properly established against a publisher through its subsidiaries in the forum. The District Judge found:

> "It [plaintiff] has not, however, succeeded in making a showing that these [subsidiary] corporations are dummies for or alter egos of Grolier. It has not shown an agency relationship."

The crucial nature of "control" in the practical solution of antitrust problems is also demonstrated in the Respondent Judge's opinion in Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram and Sons, Inc., 1967 Trade Cases, §72,186* wherein the question was whether competing divisions of the same company could conspire with each other in violation of the Sherman Act. After noting that the case was one of "first impression" (p. 84, 259) and answering the basic question in the affirmative, Judge Pence declared the test of capability to conspire:

> "Thus, whether a division is capable of conspiring depends on the peculiar facts demonstrated. Is each facet of the unincorporated division's operation in fact, for all purposes, controlled and directed from above, or is it endowed with separable, self-generated and moving power to act in the pertinent area of economic activity? This is the key question. If the division operates independently in directing the relevant business activity, then it is a separate business entity under the antitrust laws." (p. 84, 261).

We are moved to ask: If a division which is legally a part of a corporation "is a separate business entity under the antitrust laws" when it "operates independently in directing the relevant business activity" why then wouldn't a distributor which is a distinct legal entity be regarded as "a separate business entity under the antitrust laws" when it operates "independently in directing the relevant business activity?"

*This case of "first impression" is the holding upon which O'Neil relies for his primary theory of the case against petitioner (Opp. Br., Ex. C, p. XIX, fn. 1).

Finally, O'Neil's strong reliance upon Brandt v. Renfield Importers, Ltd., 278 F.2d 904 (8th Cir. 1960) is misplaced (Opp. Br. 20, 23). In that case the manufacturer had taken out licenses from the State of Missouri and had, therefore, availed itself of important privileges conferred by the State. This court most recently recognized the significance of this factor in Taylor v. Portland Paramount Corp., 383 F.2d 634, 642 (1967) when it said:

> "We cannot find that Taylor, as distinguished from Fox, has done any act by which she purposefully availed herself of the privilege of conducting activities within Oregon, thus invoking the benefits and protection of its laws."

Beyond the maintenance of business relationships with independent distributors in Hawaii, O'Neil cites visits by PCF personnel to the distributors as contributing to a "totality" of contacts which should make it reasonable for petitioner to defend itself in Hawaii. We have already dealt with these visits in our initial brief, pages 21-23. O'Neil now strains hard to maximize these contacts. Just how hard is shown by its statistic that "at least six trips were made by high echelon personnel of petitioner to Hawaii for the purpose of transacting business there." (Opp. Br. 23). Sole support for two of the "trips" is the following paragraph from a letter by Pennell of PCF to O'Neil of June 21, 1965:

> "Jim Luce, our General Sales Manager, and I are leaving for Australia on Sunday morning, June 27. We will visit briefly with Al Gould in Honolulu, and leave at midnight on PanAm. Flight #811, due to arrive in Sydney at 8:35 A.M., on Tuesday, June 29." (R. 82).

Pennell's letter goes on to say that he and Luce plan to spend two weeks in Australia. In a comparable situation, this court gave little weight to conferences in California held by officials of a Louisiana manufacturer, which were incidental to their "passing

through California, on their way to or from Hawaii." (L. D. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768, 774).

O'Neil argues further that venue is proper because "Hawaii was ... the bridge between petitioner on the Mainland and respondent O'Neil in Australia." (Opp. Br. 24). This beguiling suggestion is not supported by the facts. It is based on an erroneous finding by the District Judge who stated in his opinion:

> "Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff." (App. "A", p. 84,954).

None of the four letters cited by the Judge indicates any negotiation with PCF in Honolulu concerning a possible Peterbilt franchise.

The initial contact between the parties was made by Robert Larkin, later half owner of O'Neil, in Newark, California and Seattle, Washington, in January-February, 1963. (See R. 93-94). The actual negotiations occurred after Mr. Gould, then Peterbilt sales manager, went to Australia in April to investigate the feasibility of establishing a Peterbilt dealer there. (See R. 95-96, R. 102-05). It was only on May 10, 1963 after Gould's return that Larkin wrote the proposals to Peterbilt which ultimately led to the agreement of July 1, 1963 (R. 6). There were no discussions or meetings of any kind between representatives of the parties in Hawaii at any time, either before or after the distributorship agreement was signed (R. 98).

We pointed out in our initial brief (p. 26-27) that these activities, which antedated not only possible accrual of the action but the birth of the O'Neil firm, were irrelevant. Eastland Con-

struction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1966) holds that in determining whether a defendant transacts business in a given jurisdiction for purposes of Section 12, one looks back to the date when the action accrues. As this court observed in Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43, 48 (1966), where in a contract case "the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection."

Viewed from a purely practical standpoint, these earlier dealings have no present impact. Robert Larkin, whose Hawaiian residency provided the so-called bridge, moved to Australia in mid-March of 1963, four months before the distributor's contract was signed (R. 72, 73) and now lives at 182 Encinal Avenue, Atherton, California (R. 30). James Moir, the only other possible Hawaiian contact, who was in March, 1963 president of Moir Industries, Inc., then a Hawaiian distributor for Peterbilt (R. 64, 77-78), moved from Honolulu to Manila in January, 1964, and has lived there ever since (R. 88-90).

C. Neither Precedent Nor Logic Sustains Respondents' View That Antitrust Cases Are Exempt From The Second Reeder Requirement

O'Neil concedes that the non-antitrust venue standards articulated by this court in L. C. Reeder Contractors of Arizona v. Higgins Industries, Inc., 265 F.2d 768 (9th Cir. 1958) require that the alleged injury arise out of activities in the forum district (Opp. Br. 26). O'Neil argues, however, that this is not a required standard in antitrust cases, and would dismiss as dictum the application of the standard by this court in Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders Assn., 344 F.2d 860 (9th Cir. 1965)

(Opp. Br. 27-28). In this, counsel merely repeats the District Judge's statement (App. "A", p. 84,954) without examining its soundness. We have already explained the reasons why we believe the respondents' position to be incorrect (Initial Br. 23-26). This court, in its most recent review of the legislative and judicial history of Section 12, referred to "... Congress's purpose of enabling the injured person to sue in the district where the injury occurred..." Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 782, fn. 11). The second requirement of Reeder (265 F.2d 768, 773-74, fn. 12), that the cause of action arise from the defendant's activities in the forum, was very much in the minds of the advocates of Section 12. In United States v. National City Lines, 334 U.S. 573, 583 (1947), the Court said of those who favored enactment of Section 12:

> "The basic aim of the advocates of change was to give the plaintiff the right to bring suit and have it tried in the district where the defendant had committed violations of the Act and inflicted the forbidden injuries."

This statement is supported in a footnote which quotes one proponent as saying, "The philosophy of legislation with regard to this subject should give the venue at the place wherein the cause of action arises." (p. 583, fn. 20).

We respectfully disagree with respondents that the Reeder requirements were applied in Courtesy, a Section 12 case, through some sort of judicial inadvertence (See Initial Br. 25-26). We note that in its latest approval of the Reeder standards, in a diversity case, Taylor v. Portland Paramount Corp., 383 F.2d 634, 641 (1967), this court cited Courtesy in support, along with several cases from other fields of law.

But whether or not the Reeder requirements were meant to be applied to antitrust in Courtesy, why shouldn't these standards which this court has repeatedly called constitutional minimums, be so applied?* Is a man sued under the antitrust laws not entitled to the protection of the Constitution? Granted that the antitrust venue requirements are to be liberally applied, we doubt that the Constitution can be bent specially for antitrust cases.

O'Neil sidesteps the question whether some connection between the forum and the defendant's activities there is a necessary constitutional requirement. It argues circularly that the only relevant inquiry is whether "a constitutionally required minimal contact is found in any given case." (Opp. Br. 11) and that, therefore, it is quite irrelevant to ask whether a defendant, as contrasted with its independent distributor, transacts business in the forum (Opp. Br. 12, 24-25). It thus neatly avoids the real question - whether the constitutionally required minimum contacts are satisfied by activities of a wholly independent distributor. The burden of proving jurisdiction is, after all, upon the plaintiff, when its allegations are challenged. Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (1967); United Industrial Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 979 (D. Del. 1964) and cases cited. This burden was not met. Instead, the record shows that petitioner's contacts with Hawaii were insufficient to support a conclusion that it transacted business there.

*Most recently in Taylor v. Portland Paramount Corp., 383 F.2d 634, 641 (1967). Other courts have expressed similar views. As noted in Bullard v. Rhodes Pharmacal Co., Inc., 263 F. Supp. 79, 82-83, fn. 10 (D. Mont. 1967), the Eighth Circuit has adopted standards essentially the same as were enunciated in Reeder.

D. Instead of Exercising His Discretion, Applying the Criteria Prescribed by Section 1404(a), the District Judge in Effect Tabled Our Motion

The District Judge held that "at this stage of the litigation it is impossible for this court to ascertain ... the burden which defendant may incur." (App. "A", p. 84,956).

Neither respondent tells us just when the time would be ripe for a 1404(a) motion. Plainly, if a defendant does not make the motion at the threshold he risks a charge of waiver. Equally obvious is the difficulty of renewing the motion at a later time. Then plaintiff would argue how wasteful it would be for another judge to become familiar with the case.

What can be learned between now and eve of trial? Petitioner's 56 potential witnesses are not going to move to Hawaii. Petitioner is not going to move its files to Hawaii unless compelled to do so by the prospect of a trial there. The Hawaiian Islands are not going to move any closer to the mainland. The exact list of trial witnesses will not be known until the final pre-trial order is settled, on the eve of trial. We doubt the practicality of our renewing our motion at that time, when calendars are committed and the expenses we seek to avoid have been largely incurred. We believe it too plain for argument that Congress intended 1404(a) motions to be tested against the showing made by the parties at or close to the outset of the litigation. Viewed in this light, the District Judge's action on our motion was tantamount to employing the parliamentary technique of tabling, instead of ruling on our motion.

Aided by what O'Neil boasts is a complaint "with an unusual degree of specificity for an antitrust case" (Opp. Br. 2) and O'Neil's unusually thorough motion for production of documents, filed with

the complaint (R. 14-22), petitioner was able to estimate its probable burdens and expenses with unusual definiteness (R. 25-34, also see Initial Br. 12-14, 29).

Contrary to O'Neil's brief (Opp. Br. 31) it made no showing whatsoever of any inconvenience or expense to it of trying the case in Seattle, instead of Honolulu. It did not identify a single potential witness from Australia or a single document which was located there. In similar circumstances Chief Judge Leahy said in General Felt Products Co. v. Allen Industries, 120 F. Supp. 491, 493 (D. Del. 1954):

> "Plaintiff stands pat on its selection of forum.... If plaintiff chooses to stand mute, making no profert of his conveniences, or the justice impact on him, he assumes the risk of defendant's overcoming counter-choice of forum by a favorable balance of §1404(a)'s factors."

Also see Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967).

O'Neil now seeks to justify deferral by the District Judge of the motion to transfer, on the ground that the wisdom and experience of the Judge in antitrust matters was such that he intuitively disbelieved petitioner's showing of burdens and expense (Opp. Br. 15, 32). It is true that the District Judge for all practical purposes ignored our affidavits. He certainly did not weigh all the equities or evaluate all the facts, as required by 1404(a). However, the suggestion that the District Judge disregarded petitioner's affidavits as to witnesses, documents and expenses because he disbelieved them, is solely O'Neil's invention. The Judge did not express any doubts as to the statements made, and certainly would have had no reason to do so. Since most of the witnesses listed

by petitioner had had direct contact with respondent, O'Neil undoubtedly could verify or impeach the statements by knowledge of people in its own organization. That it chose not to file any counter-affidavits or test any of the statements by discovery furnishes persuasive support for the integrity of petitioner's sworn showing.

O'Neil's statement that our claims of probable hardship and expense are "wildly exaggerated" (Opp. Br. 32) is a strange inverted argument which says much for how totally one sided the showing of inconvenience is. What O'Neil fails to understand is that whether only 53 or 33 of the 56 witnesses listed in Mr. O'Brien's affidavit are ultimately trial witnesses is beside the point. The point is that the vast majority of trial witnesses will be from the Western District of Washington and the vast majority of the documents which will be needed are located there. O'Neil belittles the burden and expense of defending an $8,250,000 antitrust action (Opp. Br. 32). It claims that there is no precedent in antitrust history for the burdens and expense which petitioner estimates it may incur (Opp. Br. 32). While we do not claim any direct parallel with any previous antitrust action, we invite the court's attention to one case, among many cited by Judge Yankwich in "'Short Cuts' in Long Cases", 13 F.R.D. 41, 63-64 (1953), where there were 27,000 exhibits and 70,000 pages of record. O'Neil argues against itself when it refers to the techniques used to scale down the costs and inconvenience of the "big" antitrust case. If Section 1404(a) is not to be applied in big antitrust cases, where the costs and expenses are so notorious that special techniques and handling are necessary, what is it for? It is certainly no answer to tell a

defendant, as the District Judge did here, that his unopposed affidavits are insufficient because his 56 witnesses can be deposed and his 1,000 or more file drawers of records (R. 32-33) can be copied by "modern document duplicating equipment." (R. 112). Yet, that is what the Judge held (App. "A", p. 84,956). And now, O'Neil tells us that our showing is insufficient because maybe the 56 witnesses can come to Honolulu for the trial and "Mere increase in the cost of defense has never justified transfer ..." (Opp. Br. 32). We are, therefore, given two separate rationalizations of non-transfer. The Judge says we are not hurt because we can take depositions, which we pointed out, citing cases, are regarded as poor, inflexible substitutes for live testimony (Initial Br. 32-33). O'Neil says we can bring the witnesses to Honolulu for trial. If cost of defense and inconvenience are not proper criteria for weighing motions under 1404(a) we wonder what the proper tests are. In fact, O'Neil refers disparagingly to our showing of costs and inconvenience as "stock arguments." (Opp. Br. 31). We concede that the criteria we asked the District Judge to apply are commonplace. That is doubtless because they happen to be the standards prescribed by Congress -- "For the convenience of parties and witnesses in the interest of justice."

O'Neil has said not a word in support of the District Judge's generalization that, "the plaintiff's choice of forum should not be lightly set aside" (App. "A", p. 84,955). As we pointed out (Initial Br. 30-32), plaintiff's choice of forum is entitled to little or no consideration where plaintiff is a nonresident of the forum and the cause of action has little or no connection with the defendant's contacts there.

O'Neil's principal argument in opposition to our motion under §1404(a) is a plea that the statute should not apply against foreign-based aliens, since they have no home district in America in which to bring suit (Opp. Br. 30-34). Congress did not see fit to exempt such parties from §1404(a). We must, therefore, assume that foreign-based plaintiffs are subject to the same rules of transfer as American companies.*

O'Neil argues that application to it or any other foreign-based plaintiff of §1404(a) would force "foreign-based corporations ... to sue American defendants at their headquarters office." (Opp. Br. 30). O'Neil's counsel forgets his own statement to Judge Pence that his client could have sued PCF in the Northern District of California, where Peterbilt has its headquarters; in Missouri, where Kenworth has a factory, or elsewhere (Tr. 40). Of course, such actions would be subject to transfer under §1404(a). However, it takes little imagination to think of a variety of possible circumstances where the balance of convenience might not favor transfer to the headquarters district of the defendant. Many foreign firms have American bases. Many causes which might accrue to foreign companies would heavily involve witnesses in districts other than the defendant's headquarters. In fact, O'Neil's contract, sued on here, was with a division of petitioner which is located at Newark, California, a few miles from the offices of O'Neil's counsel. O'Neil's argument that it would be discriminated against if §1404(a) were applied to its action is absurd on its face.

*It is the rule in most types of cases, including those based on diversity of citizenship, that an alien may bring his action only in the district where the defendant resides. 1 Moore's Fed. Prac. (2nd ed. 1964) 1510-11, ¶0.142[6].

Its contention that it could only sue at petitioner's headquarters is disproved by the statements of its own counsel (Tr. 39-40).

Implicit in all of O'Neil's arguments on this point is the contention that it is entitled to have its case heard, irrespective of §1404(a), in a neutral ballpark. This argument is fully answered by the established rules that neutrality of forum is not a relevant consideration under §1404(a) (See our Reply Brief in Support of Petition For Leave to File, etc., p. 6) and that if at least one party has to travel, there is no sense in making the trial as equally inconvenient as possible for both parties (Initial Br. 34-36).

## VI. CONCLUSION

Issuance of a writ in the nature of mandamus is the only remedy available to correct the erroneous denial of petitioner's motion. As the Fourth Circuit put it:

> "It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done...." General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967).

Petitioner cannot be said to transact business in Hawaii. Its contacts with that state are all with independent distributors over whom it exercises no control.

If the undisputed facts on which the motion under §1404(a) was decided are insufficient to compel transfer, it is hard to think what purpose the statute serves. The showing is overwhelming that the vast majority of trial witnesses will be from the Western District of Washington and the vast majority of the documents which will be needed are located there. The District Judge never faced and decided our motion, rather he deferred considera-

tion of the merits until the burdens and expenses would actually be incurred.

For the reasons cited herein, in our initial brief and in our "Petition For Writ of Mandamus", a writ in the nature of mandamus should issue, as prayed for in our petition (p. 9).

Respectfully submitted,

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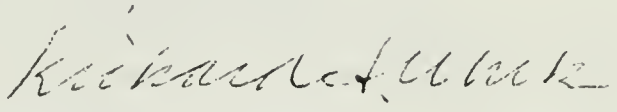
CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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**[¶ 72,352] L. C. O'Neil Trucks Pty. Limited (formerly Peterbilt (Aust.) Pty. Limited) v. Pacific Car and Foundry Co.**

In the United States District Court for the District of Hawaii. Civil No. 2724. December 22, 1967.

**Clayton Act**

**Venue—Comparative Burden—Availability of Duplicating Techniques.**—A Washington corporation, sued in Hawaii for treble damages by an Australian firm, was denied its request that the return of summons be quashed, that venue be transferred or dismissed under 28 U. S. C. 1404(a), or that venue be transferred under 28 U. S. C. 1404(a), since it was not possible at this stage of the litigation to definitively ascertain the burden which the defendant may incur. The availability of modern document duplicating equipment and depositions would greatly reduce the firm's cost and inconvenience in conducting the litigation in Hawaii, while transfer would further burden the Australian firm which had selected the American forum closest to its home. In the present posture of the case, it was not in the interest of justice to transfer the action. The court had found that the Washington firm had distributor contracts, dealings and control in Hawaii. Venue cases in diversity actions, relied upon by the firm, set more stringent standards than are required under the Clayton Act, Sec. 12.

See Private Suits, Vol. 2, ¶ 9092.

For the plaintiff: Vernon F. L. Char of Damon & Shigekane, Honolulu, Hawaii; Marcus Jackson, Sydney, Australia; Maxwell M. Blecher, San Francisco, Cal.

For the defendant: Roy A. Vitousek, Honolulu, Hawaii; Paul Fetterman and Richard S. White of Helsell, Paul, Fetterman, Todd & Hokanson, Seattle, Washington.

**Order Denying Defendant's Motions to Quash Return of Summons, To Dismiss or Transfer Pursuant to 28 U. S. C. 1406(a), and for Change of Venue Under 28 U. S. C. 1404(a)**

PENCE, D. J.: Plaintiff L. C. O'Neil Trucks Pty. Limited, of Australia, seeking treble damages from defendant Pacific Car and Foundry Company, of the United States, for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, filed its action in the District of Hawaii, pursuant to Section 12 of the Clayton Act.[1]

Pacific Car has moved this court (1) to quash return of summons and dismiss this action, or transfer it to the United States District Court for the Western District of Washington, Northern Division, pursuant to 28 U. S. C. 1406(a), or (2) for a change of venue under 28 U. S. C. 1404(a), asserting, inter alia, as to its first motion that it is a corporation organized and existing under the laws of the State of Washington and therefore is not subject to service of process within the District of Hawaii; that plaintiff corporation was formed on May 31, 1963, its agreement with defendant began on July 1, 1963, and therefore its cause of action could not have accrued prior to that date; that defendant has not transacted business or been found within the District of Hawaii within the meaning of Clayton § 12 at any time from May 31, 1963 to the present; and therefore venue cannot lie in the District of Hawaii.

"[T]he only rule of law which is uniformly applicable to all cases involving venue . . . [is that] the decision depends entirely upon the particular facts involved." *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Ass'n* [1965 TRADE CASES ¶ 71,443], 344 F. 2d 860, 863 (9 Cir. 1965).

[1] "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . ." 15 U. S. C. § 22.



APPENDIX "A"

Both parties have filed affidavits and other exhibits in support of their respective positions, and the problems have been fully briefed and argued. From that evidence so submitted to this court, the court finds, in pertinent parts, that defendant manufactures two separate lines of heavy duty trucks: Peterbilt and Kenworth. Since July 1, 1963, Peterbilt has had in force contracts with two distributors in Hawaii: with Pell Co., Inc., of Hilo, Hawaii, dated March 1, 1962, and Honolulu Iron Works Company, of Honolulu, Hawaii, dated July 1, 1963. On July 1, 1963, Kenworth had in force a distributor contract with Von Hamm-Young Mercantile, Inc., of Honolulu. As of June 15, 1966, the Von Hamm-Young contract was terminated and Amfac, Inc. of Honolulu became Kenworth's Hawaiian distributor.[3]

Hawaiian orders for its trucks and parts are placed with defendant through the local distributors. Pacific Car has the option of accepting or rejecting a prospective purchaser's order. Once accepted, defendant processes and fills Hawaiian orders and makes delivery through its distributors. Defendant warrants its merchandise in Hawaii and requires that its distributors maintain adequate sales rooms and service stations and "keep and maintain a sufficient stock of repair parts on hand" to properly service its Hawaiian customers.[4]

Pacific Car has the absolute right to change prices and terms, as well as the construction and design of trucks, on any orders submitted, and the distributor is bound thereby. Its distributors must furnish Pacific Car, each month, with a list of all new customers, name, address, trucks delivered "and such other information as requested" by the defendant.[5]

Defendant's top management personnel have made goodwill, business expansion, and/or service visits to Hawaii from time to time, including: (1) three trips by Peterbilt's export sales manager between March 1964 and June 1965; (2) one trip to Hawaii by the general manager of Peterbilt in May 1965; and (3) one trip each by Peterbilt's general manager and general sales manager in June 1965.[6]

Defendant's general manager while in Hawaii in May 1965, for business expansion purposes, engaged in negotiations with Hawaiian corporations for entry by those corporations with the defendant into the Australian market.[6]

Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff.[7]

Defendant, in support of its motion on the venue issue, relies heavily on the authority of *L. D. Reeder Contractors of Arizona v. Higgins Industries*, 265 F. 2d 768 (9 Cir. 1959) (action for breach of contract, case dismissed and service of process quashed because there was no minimum contract between defendant and the forum), and of *Kourkene v. American BBR, Inc.*, 313 F. 2d 769 (9 Cir. 1963) (action for breach of contract, service of process quashed for insufficient contact between defendant and the forum), urging that the above facts do not meet all of the three tests laid down in *Reeder* and that *Reeder* must be here controlling. Those three tests are (1) defendant must do some act or consummate some transaction within the forum; (2) the cause of action must arise out of or result from activities of defendant within the forum; and (3) assuming a minimum contact under tests (1) and (2), jurisdiction must be consonant with due process tenets of "fair play" and "substantial justice."

That *Reeder* was *not* an antitrust action must not be overlooked. The requirements for finding venue in diversity actions are much more stringent than the requirements for finding venue under Clayton § 12. Under Clayton § 12 the cause of action need not arise out of or result from activities of the defendant within the forum.[8]

Neither in *Reeder* nor *Kourkene*, nor *Mechanical Contractors Ass'n v. Mechanical Contractors A. of N. Cal.*, 342 F. 2d 393 (9 Cir.

[3] Affidavit of Robert D. O'Brien In Support of Defendant's Motion to Quash Return of Summons, To Dismiss, or for Change of Venue, pp. 2-3.

[4] Exhibits "A" and "B" attached to Affidavit of Robert D. O'Brien In Support of Defendant's Motion to Quash, etc.

[5] Exhibits "A" and "B", *supra* n. 3.

[6] Letters marked "I", "J" and "K" referred to in Affidavit of Laurence C. O'Neil attached to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Quash, etc.; also Affidavit of Robert D. O Brien, *supra* n. 2.

[6] Letter "J", *supra* n. 5.

[7] Letters marked "A", "B", "C" and "D" referred to in Affidavit of Laurence C. O'Neil attached to Plaintiff's Supplemental Memorandum in Opposition, etc.

[8] *U. S. v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 794 (1948); *U. S. v. Nat. City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573 (1948); *Eastland Construction Co. v. Keasbey & Mattison Co.* [1966 TRADE CASES ¶ 71,722], 358 F. 2d 777 (9 Cir. 1966).

1965), did the Ninth Circuit interpret the venue requirements of Section 12 of the Clayton Act. The Clayton § 12 requirements were considered in *Courtesy Chevrolet, supra,* (civil antitrust action against the Walking Horse breeders' association). Although the *Reeder* tests *were* all met in *Courtesy Chevrolet,* the latter case does *not* require that those specific standards must be met in order to find venue in an antitrust action.[9] The basic law of *Courtesy Chevrolet* is that one must consider the totality of the facts in each particular case to determine whether defendant is found or is doing such business therein as makes it reasonable or unreasonable to compel defendant to appear in the forum of plaintiff's choice. 344 F. 2d 860, 865.

From the facts set forth, *supra,* it is clear that the defendant has carried on more than minimal business activities in the District of Hawaii. The fundamentals of the distributorship contract of the parties out of which this action has arisen, were initially negotiated in Hawaii. The defendant has three distributors within the district. The defendant has a very substantial control over the parts and services which must be kept and maintained by its distributors in Hawaii. Not dissimilar to *McGee,*[10] the defendant's warranty is intended to and does apply in Hawaii to all of defendant's products sold throughout Hawaii. Defendant can, without notice to its distributors, change the prices and terms, as well as the construction and design of trucks destined for Hawaii, *after* the orders have been taken by its Hawaiian distributors, and such changes are binding on the distributor.[11] Defendant's sales, services and warranty requirements are thus welded to each sale in Hawaii of its products.

The activities in Hawaii of its top management officials during the years here involved, affecting not only its business in Hawaii but also its business in Australia, have been much more than minimal. Defendant's distributor contracts secure and maintain a tight control in Hawaii over almost every phase of the distributors' business save and except the actual job of selling and servicing defendant's trucks. *Cf. Courtesy Chevrolet, supra,* at 865.

The above facts, inter alia, taken in their totality determine that this court must find that defendant has been and is doing business in Hawaii within the purview of Clayton § 12, and it is not unreasonable to compel the defendant to appear and answer in this forum. The court finds that venue is properly laid in the District of Hawaii.

As an alternative motion, upon determination of the venue problem adversely to the defendant, defendant seeks transfer pursuant to 28 U. S. C. 1404(a), to the United States District Court for the Western District of Washington, Northern Division, where it has its home office, alleging that the District of Hawaii is an inconvenient forum. Section 1404(a) provides for transfer when such would be "for the convenience of parties and witnesses, in the interest of justice." Since venue is properly laid in this forum the burden is on the defendant to show that a change of venue will advance the interests of justice and convenience.

In making this determination, the plaintiff's choice of forum should not be lightly set aside. In enacting Clayton § 12, Congress' concern was "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy. Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs, or, as was said in the *Eastman* opinion, to remove the 'often insuperable obstacle' thrown in their way by the existing venue restrictions." Congress "intended trial to take place in the district specified by the statute and selected by the plaintiff." The provisions of Clayton §§ 4 and 12 were each "designed" to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a more effective, because more convenient, enforcement of antitrust prohibitions." [12]

Defendant argues that it will incur great expense and undue hardship in transporting

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[9] After the court had already determined that the acts of the defendant were sufficient to fulfill the venue requirements of Clayton § 12, it continued:

"Similar to the holding of this court in *Mechanical Contractors* [*supra,* 342 F. 2d 393] we here *also* 'think that the totality of the facts shown by this record satisfies the three tests laid down by us in *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 9 Cir., 1959, 265 F. 2d 768, and *Kourkene v. American B. B. R. Inc.*, 9 Cir., 1963, 313 F. 2d 769.'" (Emphasis added.) 344 F. 2d 860, 866.

[10] *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957).

[11] *Cf. McGee, supra* n. 10; *Travelers Health Assn. v. Virginia,* 339 U. S. 643 (1960); *International Shoe Co. v. Washington,* 326 U. S. 310 (1945).

[12] *United States v. Nat. City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573, 581, 582, 586 (1948).

witnesses and documents to Hawaii in order to properly defend this action. However, at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur. The availability of modern document duplicating equipment and depositions would certainly greatly reduce defendant's cost and inconvenience in conducting this litigation in Hawaii. Transfer, on the other hand, would further burden this foreign plaintiff who has chosen the American forum nearest its home base to seek redress for its alleged grievances. Transfer under Section 1404(a) rests upon the discretion of the court, as determined on the facts of each particular case. In its present posture, the court does not find that the interest of justice demands transfer of this action.

It is therefore ORDERED that defendant's motions to quash summons or dismiss or transfer venue under 28 U. S. C. 1406(a) and for transfer under 28 U. S. C. 1404(a) be and hereby are Denied.